

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Application by SBC for Authorization)	
under Section 271 of the Communications)	WC Docket No. 03-10
Act to Provide In-Region, InterLATA)	
Services in the State of Nevada)	
_____)	

**TRACK A COMMENTS AND REPLY COMMENTS OF WORLDCOM, INC.
ON THE APPLICATION BY SBC FOR AUTHORIZATION TO
PROVIDE IN-REGION, INTERLATA SERVICES IN NEVADA**

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INTRODUCTION AND EXECUTIVE SUMMARY

SBC's "Track A" Reply does not show that it satisfies the requirements of Track A, but does make clear how far SBC is willing to stretch both the statutory language and its own credibility in an attempt to do so. SBC should cut its losses and forego its illogical approach to Track A, and instead make a serious effort to facilitate new local residential UNE-P entry in Nevada and then reapply for section 271 authority.

SBC correctly states that the Track A legal standard requires it to show the existence of a "competing provider" that is an "actual commercial alternative" to SBC for local residential service in Nevada. But SBC continues to insist that it can rely for purposes of Track A on two nonpublic CLECs that currently serve only a few residential customers at most and cannot actually be chosen as an alternative to the incumbent's residential service. If these CLECs are deemed "competing" providers that offer an actual commercial alternative, Track A will have been read out of the statute. SBC alternatively points to a PCS provider, the financial viability of which is questionable, based on a new survey that follows an approach criticized by the only state commission that had the opportunity to review it. SBC finally argues, very late in this Commission's review of section 271 applications, for a change in legal standards to permit pure resellers that have no facilities in the state to be counted for Track A purposes, or even more remarkably, to not require SBC to meet Track A at all.

SBC wants the Commission effectively to read Track A out of the statute. But as explained in WorldCom's initial comments, Track A is not a mere technicality, but an important and integral part of the statute which ensures that local competition for both

residential and business customers has a foundation prior to consideration of section 271 authorization for a state. The Commission has already interpreted Track A to have a quite low bar and any further reduction would clearly violate Congress' intent. Nor is there any reason to read Track A as SBC posits. BOCs have been able to meet Track A in dozens of other states, including rural states. SBC can do so in Nevada as well, by facilitating local competition, rather than by attempting to distort the Telecommunications Act.

WorldCom still intends to launch local residential UNE-P service in Nevada this Spring, and needs the incentive to remain for SBC to cooperate and do what it can to smooth the path for local competition, as intended by the Act. SBC's application should be denied or withdrawn and refiled when SBC can legitimately satisfy Track A.

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TABLE OF CITATION FORMS

FCC ORDERS	
<u>Arkansas/Missouri Order</u>	<u>In re Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of The Telecommunications Act of 1996 to Provide In-region, InterLATA Services in Arkansas and Missouri</u> , CC Docket No. 01-194, Memorandum Opinion and Order, FCC 01-338 (rel. Nov. 16, 2001).
<u>Louisiana II Order</u>	<u>In re Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long-distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana</u> , CC Docket No. 98-121, Memorandum Opinion and Order, 13 F.C.C.R. 20599, FCC 98-271 (1998).
<u>Oklahoma Order</u>	<u>In re Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-region, InterLATA Services in Oklahoma</u> , CC Docket No. 97-121, Memorandum Opinion and Order, 12 F.C.C.R. 8685, FCC 97-228 (1997).
STATE COMMISSION ORDERS	
<u>New Mexico Order</u>	<u>In re Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process</u> , Utility Case No. 3269, Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A, and Public Interest (N.M. Pub. Reg. Comm'n Oct. 8, 2002) (Qwest Appl. App. C-New Mexico, Tab 19).
DOJ EVALUATIONS	
DOJ Eval.	Department of Justice Evaluation, WC Docket No. 03-10 (filed Feb. 21, 2003).
OTHER FILINGS	
Fredrick Aff.	Affidavit of Keith Frederick on Behalf of SBC Communications (attachment 2 to SBC Reply filed Feb. 14, 2003)
Smith Reply Aff.	Reply Affidavit of J. Gary Smith on Behalf of SBC Communications (attachment 1 to SBC Reply filed Feb. 14, 2003)

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In an effort to bolster its untenable claim that it satisfies Track A of section 271, SBC filed its “Track A’ Reply Comments” on February 14 to submit new evidence in the record, which it never provided to the Nevada Commission or the Department of Justice for their careful review, and a new theory concerning one CLEC. SBC’s Reply fails to remedy the flaws in its Track A argument. WorldCom responds below to the substantive issues raised by SBC but ignores the irrelevant rhetorical potshots SBC takes at WorldCom in an effort to distract attention from the fact that it has not satisfied Track A.

UNE-P CLEC. SBC continues to assert that one residential UNE-P provider whose identity it keeps confidential¹ is a “competing” provider that provides an “actual” commercial alternative (Reply at 7). However, SBC does not even allege that the CLEC

¹ SBC claims that it kept CLEC identities confidential to avoid disclosing proprietary information about the number of CLEC customers, although the obvious and normal way to do that is to list the carriers and keep the number of lines confidential. For example, if the lone carrier alleged by SBC to provide UNE-P residential service was active in the marketplace its identity would be obvious to other carriers, so it is the CLEC’s line count and not its name that should be kept from public view.

is offering residential service in Nevada, or that consumers in the state can choose this CLEC as an alternative to SBC.² Instead, SBC argues that the existence of a firm that provides merely a few residential lines (now 24, down from 28 when its application was filed a few weeks ago) is sufficient to prove compliance with Track A, because whether any carriers “‘offer’ service today in Nevada is beside the point.” (Reply at 7.)

SBC argues that this Commission must find the anonymous UNE-P CLEC to be a “competing provider” even though it is plainly not competing, simply because not offering residential service is the “marketing decision” of the other company (Reply at 7).³ But that same argument could be made if no CLECs served any customers in the state as a result of ostensible “marketing decisions.” Yet Congress required the existence of a facilities-based alternative to the BOC as a condition precedent to obtaining section 271 authority, even if a BOC would be precluded from long distance entry (under Track A) if CLECs did not enter. Congress understood that CLECs would enter and provide a commercial alternative if conditions were right and also understood that such competitive alternative was necessary to constrain BOCs that enter the long distance market. SBC, however, effectively argues that the Commission should ignore Track A by reading it to be met by allowing the section 271 applicant to rely on CLECs that clearly provide no constraint on SBC.

² Since the burden of proof in section 271 cases is on the applicant, no commenter needs to prove formally that CLECs asserted by SBC do not meet Track A. It is up to SBC to prove that they do. However, the undersigned counsel for WorldCom attests that on January 31, 2003 he spoke by telephone with both customer service representatives and managers for both CLECs confidentially listed by SBC as satisfying Track A due to their provision of residential service in the state of Nevada. The customer service representatives and managers at both CLECs were adamant that their companies do not offer residential service in Nevada and that anyone calling to obtain residential service in Nevada would be refused and turned away. As noted in WorldCom’s initial comments, the only exception noted was that the non-UNE-P CLEC is happy to sell business services to a consumer if the customer chooses to purchase such services.

In fact, it has been clear that the type of information on which SBC relies is insufficient from the Commission's very first section 271 decision in which an SBC application for Oklahoma was denied on Track A grounds. The Commission denied that application because SBC failed to present "evidence to show that [CLEC] Brooks is accepting requests for residential service. Thus, SBC has not even made a threshold showing that Brooks is a competing provider that satisfies section 271(c)(1)(A)."

Oklahoma Order ¶ 18. Even though Brooks had a few residential customers for testing purposes, the Commission made very clear (id. ¶ 20) that

"[W]e cannot conclude for purposes of section 271(c)(1)(A) that a carrier is a competing provider of telephone exchange service to residential subscribers if it is not even accepting requests for that service."

The Commission made an exception to this general rule in the Arkansas/Missouri section 271 order where a "relatively established" CLEC provided both business and residential service. There, the Commission deemed a CLEC with "several thousand" customers sufficient for Track A even though the carrier was not accepting new residential customers (Arkansas/Missouri Order ¶¶ 118-119). The Commission noted that absurd results could occur if a CLEC not accepting new customers were always excluded from Track A determinations, such as where a CLEC served "a million residential subscribers via UNE-P" (id. ¶ 119). Of course, in the current application there is not an established CLEC serving a million residential customers, but a barely extant CLEC serving at most 24.

Second CLEC. SBC's characterization of the second CLEC that it claims satisfies Track A (whose identity is also not publicly disclosed) has changed between

³ SBC did not address the very relevant role of high UNE rates in its Track A Reply. WorldCom noted in its initial comments that the Nevada loop rate exceeds the cost-adjusted loop rate in California by 19

SBC's application and its Track A Reply. Rather than simply claiming that this anonymous CLEC is a residential reseller that has facilities-based business service (SBC Br. at 9), SBC now claims that this CLEC provides facilities-based residential service (Reply at 8). SBC apparently considers anyone with a white page listing in the residential directory or a ported residential number to be getting "residential" service, regardless of what the service actually is.⁴ However, Attachment E to SBC's Track A Reply shows that of the 27 white page listings on which SBC relies, 16 (nearly 60%) of the customers have DS1 service (and others have multiple loops), which can hardly be considered residential service.⁵ Moreover, because this second CLEC asserts it is not selling any residential service, it does not provide a commercial alternative to the incumbent.⁶

SBC again asserts that it cannot be responsible for the fact that this second CLEC does not sell residential service. But the question is not whether SBC is "responsible," but whether SBC satisfies Track A. As noted in WorldCom's opening comments, the fact that SBC is claiming that these two CLECs are competing with it and offer an actual commercial alternative for Nevada consumers without checking basic information that it could have determined with a phone call raises troublesome questions about SBC's credibility. SBC may not be "responsible" for the marketing activities of other companies, but SBC is certainly responsible for the arguments and information it puts

percent and that the non-loop rates in Nevada are 95 percent higher than cost-adjusted rates in California.

⁴ The Commission made clear in Louisiana II Order ¶ 47 that "directory listings and ported numbers" were not sufficient to prove residential service.

⁵ SBC does not address the explanation in WorldCom's initial comments that this second CLEC is willing to sell its business services to residential customers who choose to pay for business services, except to simply say WorldCom is "wrong" (Reply at 8). SBC does place great weight on the location at which service is provided, noting that the lines are to "residential homes located in residential neighborhoods" (Smith Reply Aff. ¶ 8 (emphasis in original)), ignoring the fact that telecommuting, home offices and businesses situated in homes are increasingly common.

forth in its filings. The very fact that SBC continues to advocate that it satisfies Track A based on these CLECs, even though it is abundantly clear that these CLECs do not provide an actual alternative for residential customers, is nothing short of shocking.

Leap/Cricket PCS. SBC next relies on what DOJ characterizes as the “specialized offering of PCS service” of Leap/Cricket. DOJ Eval. at 8. DOJ notes that PCS competition has never been relied on by the FCC for Track A purposes (*id.* at 7), although SBC is correct that the Commission has held that PCS may perhaps satisfy Track A in theory. But it is clear that the original information SBC provided on PCS was insufficient to meet Track A, given the absence of supporting data.

SBC therefore now presents new information. Unfortunately, whether due to intentional “gaming” by SBC or not, SBC did not provide this information in time for either DOJ or the Nevada Commission to analyze it.⁷ But even with this additional showing, SBC continues to duck the hard issues.

SBC submits a survey taken this month of Leap/Cricket customers in an attempt to bolster its Track A claims. SBC acknowledges that the survey was conducted by the company that conducted a similar survey of Leap/Cricket customers in New Mexico⁸ which was soundly criticized by the New Mexico Commission as noted in WorldCom’s initial comments. However, even in the face of that criticism, the Nevada survey takes the same approach and suffers from similar defects.

⁶ See n.2, *supra*.

⁷ DOJ correctly notes that the Nevada Commission did not address PCS competition in its recommendation. DOJ Eval. at 7. By contrast, the New Mexico Commission did consider Leap/Cricket competition in that state, including a survey comparable to the one SBC submitted with its Track A Reply and concluded that “[t]here is no single exhibit, strand of testimony or other piece of evidence that proves with any degree of reasonable certainty -- let alone evidence sufficient to fulfill the substantial evidence standard that Commission orders must satisfy -- that Qwest has met its burden of showing there is an actual and significant number of Cricket subscribers in Qwest’s New Mexico territory who have substituted broadband PCS service for Qwest wireline service.” New Mexico Order ¶ 155.

For example, the entire point of the survey was to determine whether Leap/Cricket customers were using the service as substitutes for SBC service or merely supplementing their SBC service. To determine this key issue the survey asked “Do you have wireline local telephone service in your home?”⁹ Participants were not provided with a definition of the term “wireline.”¹⁰ Although the term “wireline” is part of the standard vocabulary of telecommunications professionals, it is not safe to assume that the same is true for most people, who might respond that they do not have a “wireline” phone simply because they use a common cordless phone – or because they have no idea what a wireless phone is. Therefore a response indicating that a customer did not have “wireline” service may say little about whether a customer relies exclusively on Leap/Cricket service; it may simply indicate a misunderstanding of the meaning of “wireline” service, undermining the reliability of the study.

Moreover, SBC relies on the wrong legal standard in its Reply affidavits by assuming that it need only show that more than a de minimis number of wireline customers have substituted PCS service for their wireline service. But it is clear from the Commission’s Louisiana II Order that there must be a “significant number” of customers who substitute PCS for wireline service (although there was of course no market share test established). Louisiana II Order ¶ 40. The evidence in Louisiana II would have shown that there were the sort of small numbers that SBC claims is more than de minimis, but the Commission was looking for much greater substitution of PCS for wireline service. It only makes sense that the Commission has demanded more than de

⁸ Frederick Aff. ¶ 5.

⁹ Frederick Aff. ¶ 11, Att. B at 2.

minimis substitution of PCS service for incumbent service before concluding that a PCS provider is an actual commercial alternative to the BOC. That is because PCS has many limitations as a substitute for wireline service, as discussed in WorldCom's initial comments. While wireless service certainly has some advantages compared to wireline service, the disadvantages mean most customers are unwilling to substitute one for the other, rather than merely supplementing wireline service.

SBC also gives the issue of Leap/Cricket's ongoing viability the back of its hand (Reply at 11 n.6) by asserting that a competitor satisfies Track A as long as it is in business at the time of the application (and had not exited by the time of reply comments). SBC, of course, ignores the principle that BOCs are expected to raise such factual issues and have them reviewed first by state commissions prior to bringing such matters to this Commission in their federal section 271 applications. Moreover, Leap/Cricket's deteriorating condition should be of serious concern, as its shares fell from \$102.00 a share in March 2000 to 15 cents a share this week.¹¹ Nor is SBC willing to recognize the need to test whether there is puffery in the Leap/Cricket press releases and marketing materials, which it argues should be taken at face value. SBC should have been on notice, however, from the multiple class action lawsuits that were filed in the days and weeks before its application was filed that Leap/Cricket's claims may not be able to be taken at face value. Those federal class action complaints claim that Leap made false and misleading statements about its condition, which appear to be overstated given the "unique nature" of Leap/Cricket customers and rapidly decreasing cell phone

¹⁰ If unsure of what "local telephone service" means, respondents were read: "By wireline local telephone service we mean dial-tone phone service provided by your local phone company that allows you to make and receive phone calls by plugging your home phone into a wall-jack." Frederick Aff., Att. B at 2.

¹¹ See <http://biz.yahoo.com/p/l/win.ob.html>.

pricing.¹² If Leap/Cricket cannot be counted on to stay in business in Nevada, it cannot be considered to meet Congress' purpose in requiring the existence of an actual provider of competitive services to demonstrate compliance with Track A.

Pure Resellers. SBC is left arguing that residential resellers that do not even have facilities-based business service should be sufficient for Track A, even though this standard has never previously been permitted in any section 271 application. DOJ Eval. at 7. SBC professes to find “no basis in law or logic” for this rule (Reply at 13), but the Commission's position that a CLEC must have facilities in the state helps assure that the CLEC is committed to the state through its facilities and will not so easily pull up stakes and exit the market as could a pure reseller. More important, it is simply what Congress required. Moreover, SBC does not disagree with WorldCom's analysis of Nevada resellers as largely being higher priced pre-paid services that are only attractive to those who cannot obtain SBC local service, rather than providing a commercial alternative for typical consumers.

Finally, in a shocking example of blatant overreaching or confusion, SBC makes a naked plea for section 271 authority even if it cannot satisfy Track A. Reply at 16-17. SBC relies on ¶ 48 of the Louisiana II Order, where the Commission merely suggested that rather than reading the statute to require “facilities-based service to both classes of subscribers to meet Track A,” it might be reasonable to consider Track A satisfied where “competitors' service to residential customers is wholly through resale.” But in making this statement, the Commission was focused on a CLEC that had facilities-based business customers as well as residential resale customers. It was not suggesting that Track A

¹² See, e.g., Class Action Complaint, Hudson v. Leap Wireless International, Inc., No. 03-CV-72, ¶ 23 (S.D. Cal. filed Jan. 10, 2003), <http://www.whesq.com/Leap/complaint1.pdf>.

could be satisfied where the only CLECs providing residential service provided no facilities-based service to anyone, much less that Track A need not be satisfied at all. Thus, even if the dicta from the Louisiana II Order were correct, and Track A could be satisfied by a BOC relying on a CLEC with facilities-based business service and resale residential service (id. ¶ 47), SBC would fail to meet that standard in Nevada.¹³

CONCLUSION

SBC's application to provide in-region interLATA services in Nevada should be denied.

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February 26, 2003

¹³ The language SBC quotes from Chairman Powell requires on its face "non-trivial facilities-based competition" and does not suggest even pure resale is sufficient for Track A. Reply at 16-17.

Certificate of Service

I, Lonzena Rogers, do hereby certify, that on this 26th day of February, 2003, I have electronically served a true and correct copy of WorldCom, Inc.'s Track A Comments and Reply Comments in WC Docket No. 03-10 on the following:

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